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April 17, 2006

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 21, 2005

Case Number: TSO-0270

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

This proceeding provides the individual an opportunity to respond to the allegations contained in the statement of charges included with the June 17, 2005, Notification Letter. DOE Exhibit #9.<sup>1</sup> The statement of charges indicates that a DOE consulting psychologist diagnosed the individual as a user of alcohol habitually to excess. According to the Notification Letter, the diagnosis gives rise to a security concern under Criterion J. 10 C.F.R. § 710.8 (j).<sup>2</sup>

The DOE consulting psychologist's diagnosis was based on the individual's arrest for Driving Under the Influence of Alcohol (DUI) in 1994 and his statements during a 2003 Personnel Security Interview (PSI) that he "currently drinks a half of a pint of Jim Beam Whisky on the weekend and during the middle of the week two or three ounces of whiskey in a large drink." June 17 statement of charges at 1.

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<sup>1</sup> Originally the notification letter was based on a DOE consulting psychiatrist's November 2003 report which diagnosed the individual with alcohol abuse. However, that consulting psychiatrist is no longer available for DOE hearings. Therefore, the DOE had the individual examined by a DOE consulting psychologist. The DOE consulting psychologist's October 24, 2005 evaluation report indicates the individual uses alcohol habitually to excess. The DOE issued a revised statement of charges on November 15, 2005.

<sup>2</sup> The June 17 notification letter indicated Criteria J and L security concerns. The Criterion L concern was based on the individual's 1994 DUI arrest, as well as his level of alcohol consumption in 2002. The revised statement of charges indicates that on November 15, 2005, the DOE withdrew the criterion L concern. DOE Exhibit 9 at 1. Therefore, the only concern I will consider in this decision is the criterion J security concern.

The individual raises two arguments to mitigate the security concern. First, he states his level of alcohol consumption was never as high as reported in the statement of charges. Second, he indicates that he no longer consumes significant amounts of alcohol. At the hearing the individual presented his own testimony and the testimony of seven individuals who have known him since 2003. The DOE presented the testimony of the DOE consulting psychologist. The following is a summary of the relevant testimony.

## II. HEARING

### A. Previous Supervisor

The previous supervisor testified that she has known the individual since his work group was formed in December 2002. Transcript of Hearing (Tr.) at 29. The individual was employed by a DOE contractor and joined the work group soon after it was formed. The previous supervisor testified that she was the individual's direct supervisor from December 2002 to March 2005. Tr. at 29. She testified that she works closely with the individual at the DOE facility during their regular duties and during local and out of town training exercises. The local training exercises typically last several days, during which they are housed at the DOE facility. The out of town exercises typically last 10 days. Tr. at 31. She also testifies that she and the individual are social friends and visit each others homes on a regular basis. Tr. at 31.

The previous supervisor testified that she has never seen the individual intoxicated. Tr. at 31. She was able to recall two occasions on which she saw the individual consume alcohol. She testified that she saw the individual consume alcohol a year before the hearing. On that occasion, he had a glass of wine at an Easter dinner she held at her home. Tr. at 32 and 37. She also recalled that 15 months prior to the hearing, during a ten day out of town training period, she was with the individual at a local restaurant when he had two glasses of beer. Tr. at 36.

### B. Co-workers

The first co-worker testified that he has worked closely with the individual since the work group was created. Tr. at 43. He sees the individual socially approximately once a month. Tr. at 47. He testified that he is aware that the individual did consume alcohol prior to 2003. However, he has never seen the individual consume alcohol and he does not believe the individual has consumed any alcohol in the last year. Tr. at 49.

The second co-worker testified that he has worked with the individual for two years. Tr. at 53. For the last year he has socialized with the individual twice a month. Tr. at 56. The only time he has seen the individual consume alcohol was at the Easter dinner described by the prior supervisor. Tr. 55 and 62. The second co-worker testified that the individual has told him that he no longer consumes alcohol. Tr. at 61.

The third co-worker testified that he has known the individual since the work group was created. Tr. at 64. He testified that he works closely with the individual and socializes with him at least twice a week. Tr. at 65. He has never seen the individual consume alcohol. Tr. at 66.

The fourth co-worker testified that she has known the individual for three years and they have worked together every week in those three years. Tr. at 80. She also testified that she and the individual share an interest in dogs and they talk about their dogs at work and they talk on the phone a few times a month about their dogs. Tr. at 82. She has never seen the individual consume alcohol, nor has she noticed any problems with the individual's speech during their telephone conversations. Tr. at 83.

#### C. The Individual's Recent Supervisor

The individual's recent supervisor testified that from March 2005 through March 2006 she was the individual's supervisor. Tr. at 70. She testified that it is her responsibility to evaluate whether the employees in her group are fit for work. Tr. at 76. She testified that she has never seen any sign that the individual has consumed alcohol. Tr. at 72. In addition she testified that she has called in the individual to come to work on a number of weekends and that he has always been ready and willing to work and never shown any signs that he consumed alcohol prior to those unscheduled work sessions. Tr. at 72.

#### D. Second Line Supervisor

The second line supervisor testified that he has worked with the individual for three years. He occasionally socializes with the individual after work hours at the site or when the work group was on a travel assignment. Tr. at 85. During the three years he has seen the individual consume one or two beers after work on the DOE site. Tr. at 87. The last time he saw the individual consume any beer was a year and a half prior to the hearing. Tr. at 87.

#### E. The Individual

The individual testified that he received his DUI in 1994 when he was 23 years old and attending college. Tr. at 109. He married his former wife in 1998. DOE Exhibit #7 at page 5. In 2002 he adopted her nine year old son. Tr. at 102. He testified that he did not drink at home during their marriage because he did not believe it was appropriate to consume alcohol around a young child. He was separated in 2003 and divorced in 2005.

The individual testified that he has only consumed alcohol on four occasions since November 2003 and that in each of the four occasions he only drank one or two drinks of alcohol. Tr. at 8. The individual testified with the exception on the DUI in 1994 he has never driven while under the influence of alcohol. Tr. at 103.

#### F. The DOE Consulting Psychologist

The DOE Consulting psychologist testified in two separate segments during the Hearing. Initially she testified about the basis for her evaluation. She testified that the individual was arrested for a DUI in 1994 and between the ages of 15 and 25 (from 1986 to 1996) he would become intoxicated once or twice a month. Tr. at 12. In 1996 his alcohol consumption increased to one pint of whisky three times a week. Tr. at 13. She testified that during her interview, the individual indicated he drastically reduced his

consumption of alcohol after his evaluation by the DOE consulting psychiatrist in 2003. Tr. at 13. She testified that:

[The individual] was very invested in the group with whom he worked, very close to those people. It mattered to him a great deal that he did a good job for that group, and that he still be involved with them. And that is the reason he gave for decreasing his alcohol use, because he wanted to keep his job, and that was important to him.

Tr. at 14. The DOE consulting psychologist's report indicated that, without corroboration, the individual's statements are "not considered adequate" to demonstrate rehabilitation. DOE consulting psychologist's report at 10.

After all the other witnesses had testified, the DOE consulting psychologist testified for a second time. She stated that she is convinced that the individual has significantly reduced his consumption of alcohol and that he has not consumed alcohol to excess in the last three years. She testified that the individual's level of consumption of alcohol in the 3 years indicates he is reformed from her diagnosis of use of alcohol habitually to excess. Tr. at 111.

### III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

#### A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues.

In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

#### B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

#### IV. ANALYSIS

At the Hearing the individual tried to minimize his consumption of alcohol prior to 2003. He testified:

I don't believe I've ever had a problem with alcohol in my life. I know that when I was younger in college years ago, then I consumed too much alcohol during that time. Of course that was just for a short amount of time and after that you just kind of get over it.

Tr. at 100. I was not convinced by the individual's testimony that he consumed less alcohol than indicated in the statement of charges and that he has never had a problem with alcohol. During his August 26, 2003, PSI he indicated that in the past he regularly drank three pints of whisky during a week. PSI at 24. He also stated that when he consumed alcohol at that level it was his intent is to become intoxicated. PSI at 27. Finally, he stated that the last time he was intoxicated was the Saturday before the PSI. PSI at 24. I believe he does not understand his problem with alcohol prior to November 2003 and, I believe, he is unable to fully admit to himself the level of his alcohol consumption prior to November 2003.

Furthermore, the individual failed to bring forward any testimony from friends and family who knew him before 2003. I encouraged him to call as witnesses his extended family, his friends, his former wife and friends of his former wife. When he was asked at the hearing why he did not call such witnesses to support his claim that his level of alcohol use prior to 2003 was lower than the DOE believes, he indicated that "I'd rather not involve my family in work business." This indicates to me that he is not being fully candid about his alcohol consumption and the problems that alcohol consumption caused him prior to 2003. Therefore, I believe that the individual has not demonstrated that he did not use alcohol habitually to excess during the period 1985 to 2003.

Prior to 2003 the individual tended to drink to excessively when he was secluded. In his current job situation his daily involvement with others does not give rise to an opportunity for the secluded consumption of alcohol. For this reason I am convinced that his overall lifestyle and daily pattern of life are

very different now from what they were prior to 2003. My belief that his lifestyle has changed is supported by my positive assessment of the individual's demeanor when he talked about his use of alcohol since November 2003. His witnesses that have been involved in all aspects of his life since November 2003 further supported the belief that the individual has, since November 2003, only consumed alcohol on four occasions and on each of those occasions he only consumed one or two drinks of alcohol.

Furthermore, I believe the individual is very committed to his job and the other members of his work group. I believe that it is unlikely that he will consume alcohol to excess and risk losing his job and this association with the work group. Therefore, I agree with the assessment made by the DOE consulting psychologist that this individual is reformed from the diagnosis that he uses alcohol habitually to excess.

## V. CONCLUSION

I have concluded that the individual has mitigated the Criterion J security concern related to his use of alcohol habitually to excess. Accordingly, I find that the individual's suspended access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker  
Hearing Officer  
Office of Hearings and Appeals

Date: April 17, 2006